

**Advisory Action  
Before the Filing of an Appeal Brief**

**Application No.**

10/759,160

**Applicant(s)**

KOHLHASE ET AL.

**Examiner**

SAMIRA JEAN-LOUIS

**Art Unit**

1617

***--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --***

THE REPLY FILED 16 June 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 78-136.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See continuation sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_  
13. ☐ Other: \_\_\_\_\_.

/SREENI PADMANABHAN/  
Supervisory Patent Examiner, Art Unit 1617

Applicant's arguments with respect to the withdrawal of the finality of the rejection dated 04/16/08 due to the lack of clarity of the rejection and due to the non-consideration of the pearlescent property of the composition has been fully considered and is found non-persuasive. The Office Action dated 04/16/08 clearly sets forth an obviousness rejection over Riedel in view of Charlton. Examiner further stated what Riedel teaches and what was deficient in Riedel and how Charlton overcame this deficiency. While a typographical error was made on page 8 (i.e. Chapin), it is clear from the Charlton reference that Charlton teaches sodium hydroxide in the composition. Consequently, applicant's arguments of unclarity is not persuasive given the Office Action clearly stated the two references and what they taught. As to the pearlescent effect not considered, Examiner respectfully points out that intended use and physical properties are not given patentable weight. Given that pearlescence is a property of the composition and Riedel teaches the same composition as applicant's, the composition of Riedel in view of Charlton would necessarily possess the same pearlescent properties as applicant given that properties are inseparable from the compounds in the composition.

Applicant's arguments that Riedel teaches polymers in general and no specific associative polymers and amphiphilic polymers has been fully considered but is not found persuasive. Examiner respectfully disagrees that Riedel does not teach the aforementioned polymers given that Riedel teaches the use of polymers or mixtures thereof in the composition. In fact, Riedel teaches various polymers including acrylate/C10-30 -alkyl acrylate cross polymer as emulsifiers that can be added to the composition. While Riedel does not explicitly teach such polymer as an amphiphilic polymer, applicant himself states on the record that such polymer is an amphiphilic polymer (see pg. 9, table 1). Thus, one of ordinary skill can immediately envisaged adding such polymer as Riedel teaches its use in his composition. Moreover, Riedel teaches the use of Abil Wax 9840 in the composition. Again, Riedel did not explicitly state that such polymer is a siloxane elastomer, however, Examiner would like to cite Evonik Industries data sheet of Abil Wax 9840 which clearly describes Abil Wax 9840 as liquid to Waxy organopolysiloxane (i.e. siloxane) that are synthesized by linking polydimethyl siloxane (i.e. polymer) with long chain of hydrocarbons and possesses good spreadability (i.e. polymer with elasticity) and feels good to the skin (see pg. 2) and this necessarily meets applicant's definition of a siloxane elastomer defined in the specification on page 11. Additionally, Examiner further points out that claims 78-79 and 120 only requires the limitation of at least one polymer whether associative, amphiphilic or siloxane elastomer which Riedel necessarily meets. While applicant's intention of Abil Wax 9840 was for the purpose of an oil component, based on applicant's definition of a siloxane elastomer Abil Wax 9840 necessarily meets the limitation of a siloxane elastomer and necessarily reads on claims 132-133.

Applicant's arguments that the Charlton reference is to a water-wetted skin composition that is contrastingly different from Riedel's composition and therefore would not have render obvious addition of Charlton's ingredients in its composition has been fully considered but is not found persuasive. Examiner points out that Charlton was provided to demonstrate that dermatological (i.e. skin) composition can contain neutralizing agents and stabilizing agents such as Stabylen 30 which is commonly known in the art as acrylate/vinyl isodenaote crosspolymer. Examiner refers applicant to the Sine et al. U.S. Patent 6,183,766 B1 published on February 6, 2001 prior to applicant's invention which clearly teaches Stabylen 30 as acrylate/vinyl isodenaote crosspolymer (see col. 11, line 14). Again, while Charlton and Sine et al. did not explicitly states that Stabylen 30 is an amphiphilic polymer, applicant himself states on the record that acrylate/vinyl isodenaote crosspolymer is an amphiphilic polymer, therefore Charlton necessarily teaches a composition containing an amphiphilic polymer since Charlton teaches the exact same polymer as applicant. Regarding applicant's arguments that tromethamine is the neutralizing agent in Charlton and not sodium hydroxide is not persuasive given that Charlton explicitly teaches other neutralizing agents that can be added include sodium hydroxide.

Applicant's arguments that Riedel does not teach a composition substantially free of mono and di-fatty esters of glycerol and glycol has been fully considered but is not found persuasive. Given that applicant did not provide a definition of what is regarded as substantially free or the critical limitation encompassed by the term, Examiner concludes that Riedel's addition of 0.2-10% mono and/or diglycerides of fatty acids is substantially free of such compounds (see abstract part (b) and col. 17, claim 1).